

James H. Goetz
GOETZ, GALLIK & BALDWIN, P.C.
35 North Grand Avenue
P.O. Box 6580
Bozeman, MT 59771-6580
Ph: (406) 587-0618; Fax: (406) 587-5144
E-mail: jim@goetzlawfirm.com

Banks Brown, *Admitted Pro Hac Vice*
Michael J. Dillon, *Admitted Pro Hac Vice*
McDERMOTT WILL & EMERY LLP
340 Madison Avenue
New York, NY 10017
Ph: (212) 547-5400; Fax: (212) 547-5444
E-mail: bbrown@mwe.com; mdillon@mwe.com
Attorneys for Counterclaim Defendants Gunvor Group, Ltd. and Pinesdale, LLC

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
(Billings Division)**

SIGNAL PEAK ENERGY, LLC,

Plaintiff,

v.

EASTERN MONTANA
MINERALS, INC., and
MUSSELSHELL RESOURCES,
LLC,

Defendants.

Case 1:12-cv-00055-RFC

COUNTERCLAIM DEFENDANTS
PINESDALE LLC'S AND
GUNVOR GROUP LTD.'S
RESPONSE TO
DEFENDANTS/COUNTERCLAIM
PLAINTIFFS' PROPOSED
DISCOVERY PLAN

EASTERN MONTANA
MINERALS, INC., and
MUSSELSHELL RESOURCES,
LLC,

Counterclaim
Plaintiffs,

v.

SIGNAL PEAK ENERGY, LLC;
FIRSTENERGY CORP.;
FIRSTENERGY VENTURES
CORP.; FIRSTENERGY
GENERATION CORP.; GUNVOR
GROUP, LTD.; PINESDALE
LLC; BOICH COMPANIES, LLC;
WMB MARKETING
VENTURES, LLC; GLOBAL
COAL SALES GROUP, LLC; and
GLOBAL MINING HOLDING
COMPANY, LLC,

Counterclaim
Defendants.

Fed. R. Civ. P. 26(f)(1) states, in pertinent part, that “the parties must confer as soon as practicable – and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).” At such conference, the parties are to attempt “in good faith to agree on the proposed discovery plan . . .” Fed. R. Civ. P. 26(f)(2).

When Defendants/Counterclaim Plaintiffs Eastern Montana Minerals, Inc. and Musselshell Resources, LLC (collectively, “EMM”) attempted to convene a conference call to satisfy these provisions, counsel for the respective Counterclaim Defendants informed EMM that a Rule 26(f) conference to discuss a discovery plan was premature (and therefore not “practicable” under Rule 26(f)(1)), given that no scheduling conference has been calendared, and given that there are pending motions that will hugely impact a Discovery Plan. Specifically, Counterclaim Defendants Gunvor Group Ltd. (“Gunvor”) and Pinesdale, LLC (“Pinesdale”) filed a Motion for Protective Order on September 14, 2012 (Dkt. Nos. 95-96);¹ and the remaining Counterclaim Defendants joined that Motion (Dkt. No. 97). (Notably, EMM has yet to respond to this Motion.) Further, all Counterclaim Defendants have filed motions to dismiss EMM’s Counterclaims,

¹ Gunvor and Pinedale have requested that discovery be delayed until the Court’s resolution of their Fed. R. Civ. P. 12 motions.

pursuant to Fed. R. Civ. P. 12, and a number of these motions include jurisdictional arguments that are dispositive as to EMM's claims. (Dkt. Nos. 67-86, 91-94) .

Resolution of these motions – one way or the other – will necessarily inform a proposed Discovery Plan for this litigation, as the rulings of this Court will impact (i) the number of parties from whom discovery must be taken; and (ii) the claims and issues upon which discovery may be taken. At minimum, resolution of the above-referenced motions will inform the Counterclaim Defendants' respective thoughts and proposals concerning sections A, B, D, E and F of EMM's proposed Discovery Plan. Without such guidance from the Court, and given the parties' divergent positions in the above-referenced motions, it is difficult for Counterclaim Defendants to see how they can meet their obligations under Rule 26(f)(2) to "attempt[] in good faith to agree on the discovery plan." A Rule 26(f) conference would be an exercise in the hypothetical, and there would be little ground for agreement as to the topics that are covered in the Discovery Plan.

Accordingly, Gunvor and Pinesdale object to EMM's unilateral submission of a proposed Discovery Plan, pursuant to Rule 26(f). First, such submission obviates the very purpose of the Rule, which contemplates a joint proposal. Second, EMM's submission is a patent end-run around Gunvor/Pinesdale's proper Motion For A Protective Order. Third, Gunvor and Pinesdale submit that the proposals advanced by EMM in their proposed Discovery Plan cannot – in the

abstract – be determined to be reasonable or efficient by either the Counterclaim Defendants or the Court.

Gunvor and Pinesdale therefore respectfully submit that the Court should disregard EMM's Proposed Discovery Plan until such time as a Rule 26(f) conference is practicable, and the parties thereby confer.

DATED this 28th day of September, 2012.

_____/s/ James H. Goetz_____
GOETZ, GALLIK & BALDWIN, P.C
35 North Grand Avenue
P.O. Box 6580
Bozeman, MT 59771-6580
**Attorney for Counterclaim Defendants
Gunvor Group, Ltd. and Pinesdale,
LLC**

CERTIFICATE OF SERVICE

I certify that, on September 28, 2012, a copy of the foregoing document was served on the following persons by the following means:

<u>1-9</u>	CM/ECF
_____	Hand Delivery
_____	Mail
_____	Overnight Delivery Service
_____	Fax
_____	E-Mail

1. Ross W. McLinden, Esq.
MOULTON BELLINGHAM PC
27 N. 27th Street, Ste. 1900
Billings, MT 59103
Attorney for Defendants and Counterclaim Plaintiffs Eastern Montana Minerals, Inc. and Musselshell Resources, LLC
2. Christopher R. Belmonte, Esq.
SATTERLEE STEPHENS BURKE & BURKE LLP
230 Park Avenue
New York, New York 10169
Attorney for Defendants and Counterclaim Plaintiffs Eastern Montana Minerals, Inc. and Musselshell Resources, LLC
3. Dai Wai Chin Feman, Esq.
SATTERLEE STEPHENS BURKE & BURKE LLP
230 Park Avenue
New York, New York 10169
Attorney for Defendants and Counterclaim Plaintiffs Eastern Montana Minerals, Inc. and Musselshell Resources, LLC

4. A. Clifford Edwards, Esq.
EDWARDS, FRICKLE & CULVER
1648 Poly Drive, Suite 206
Billings, MT 59102
Attorney for Plaintiff and Counterclaim Defendants Signal Peak Energy, LLC; FirstEnergy Corp.; FirstEnergy Ventures Corp.; FirstEnergy Generation Corp.; Boich Companies, LLC; WMB Marketing Ventures, LLC; Global Coal Sales Group, LLC; and Global Mining Holding Company, LLC
5. Triel D. Culver, Esq.
EDWARDS, FRICKLE & CULVER
1648 Poly Drive, Suite 206
Billings, MT 59102
Attorney for Plaintiff and Counterclaim Defendants Signal Peak Energy, LLC; FirstEnergy Corp.; FirstEnergy Ventures Corp.; FirstEnergy Generation Corp.; Boich Companies, LLC; WMB Marketing Ventures, LLC; Global Coal Sales Group, LLC; and Global Mining Holding Company, LLC
6. A. Christopher Edwards, Esq.
EDWARDS, FRICKLE & CULVER
1648 Poly Drive, Suite 206
Billings, MT 59102
Attorney for Plaintiff and Counterclaim Defendants Signal Peak Energy, LLC; FirstEnergy Corp.; FirstEnergy Ventures Corp.; FirstEnergy Generation Corp.; Boich Companies, LLC; WMB Marketing Ventures, LLC; Global Coal Sales Group, LLC; and Global Mining Holding Company, LLC
7. John W. Edwards, Esq.
EDWARDS, FRICKLE & CULVER
1648 Poly Drive, Suite 206
Billings, MT 59102
Attorney for Plaintiff and Counterclaim Defendants Signal Peak Energy, LLC; FirstEnergy Corp.; FirstEnergy Ventures Corp.; FirstEnergy Generation Corp.; Boich Companies, LLC; WMB Marketing Ventures, LLC; Global Coal Sales Group, LLC; and Global Mining Holding Company, LLC

8. Bruce A. Americus, Esq.
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Centre, 20th Floor
301 Grant Street
Pittsburgh, PA 15219
Attorney for Plaintiff and Counterclaim Defendants Signal Peak Energy, LLC; FirstEnergy Corp.; FirstEnergy Ventures Corp.; FirstEnergy Generation Corp.; Boich Companies, LLC; WMB Marketing Ventures, LLC; Global Coal Sales Group, LLC; and Global Mining Holding Company, LLC
9. Matthew F. Burger, Esq.
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Centre, 20th Floor
301 Grant Street
Pittsburgh, PA 15219
Attorney for Plaintiff and Counterclaim Defendants Signal Peak Energy, LLC; FirstEnergy Corp.; FirstEnergy Ventures Corp.; FirstEnergy Generation Corp.; Boich Companies, LLC; WMB Marketing Ventures, LLC; Global Coal Sales Group, LLC; and Global Mining Holding Company, LLC

/s/ James H. Goetz
GOETZ, GALLIK & BALDWIN, P. C.